(26,413)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 398.

REBECCA COON, PLAINTIFF IN ERROR,

vs.

JAMES KENNEDY.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 1, 1918.

1 New Jersey Court of Errors and Appeals.

REBECCA COON, Petitioner-Appellant,

vs.

JAMES KENNEDY, Respondent-Appellee.

On Appeal from Supreme Court.

State- of the Case.

McDermott & Enright, attorneys of appellant.
Kalisch & Kalisch, attorneys of appellee.

2 *Writ of Certiorari.*

Filed October 30, 1916.

NEW JERSEY, *ss:*

The State of New Jersey to the Court of Common Pleas in and for the County of Union and Abram P. Morris, Clerk of said Court, and Rebecca Coon, administratrix, &c., of Robert Coon, deceased, Greeting:

We being willing for certain reasons to be certified of and concerning a certain determination of facts and order on motion for a modification of determination and facts and conclusions rendered on the first day of June, nineteen hundred and sixteen, by the Honorable James C. Connolly, Judge of the said Court of Common Pleas in and for the said County of Union, in certain proceedings brought on behalf of Rebecca Coon, administratrix, &c. of Robert Coon, deceased, petitioner, against James Kennedy, doing business under the name of Kennedy's Towing Line, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey, entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, nineteen hundred and eleven, and the acts amendatory thereof and supplemental thereto, we command you that the said determination and judgment, together with all proceedings for the making of the same and all things touching and concerning the same, as fully and entirely as before you they remain or are in your custody and control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature at Trenton, on the thirtieth day of October, nineteen hundred and sixteen, that

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therein may be caused to be done what of right and according to law ought to be done.

Witness, the Honorable James F. Minturn, Chief Justice of our said Supreme Court, at Trenton, this day of October, nineteen hundred and sixteen.

WILLIAM C. GEBHARDT,
Clerk.

KALISCH & KALISCH,
Attorneys.

This writ is allowed; let it be sealed.

J. J. BERGEN,
Jus. Sup. Ct.

4 *Petition.*

Filed March 24, 1916.

Union County Court of Common Pleas.

REBECCA COON, Petitioner,

vs.

JAMES KENNEDY, Doing Business under the Name of Kennedy's Towing Line, Respondent.

On Petition for Compensation: Petition.

The petition of Rebecca Coon, residing in the City of Brooklyn, New York, shows and charges as follows:

(1) Your petitioner is the widow of Robert Coon, who died while in the employ of respondent August 4th, 1915.

(2) Petitioner's husband was at the time of his death engineer of the steam tug "Elsie K," which was on a journey from Brooklyn, New York, to Elizabeth, New Jersey; that when about three or four hundred feet off Constable Hook and within the bounds of the State of New Jersey the said steam tug "Elsie K" foundered and sunk in a storm, and your petitioner's husband and the master of said steam tug were lost.

(3) That the said steam tug "Elsie K" was registered at the port of Newark, New Jersey, where the said steam tug "Elsie K" belonged at the time of her registry, to wit, on a date prior to
5 August 4th, 1915; that the said steam tug "Elsie K" belonged to the port of Newark at the time of the accident above mentioned; that the residence and place of business of the respondent is at Elizabeth, Union County, New Jersey.

(4) That the employment of the said Robert Coon was in the State of New Jersey and was subject to the provisions of an Act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the

determination of liability and compensation thereunder, approved April 4, 1911," and the acts amendatory thereof and supplemental thereto.

(5) That the wages of the said Robert Coon were $85.00 per month and board on the said steam-tug, which had been agreed with his employer to be worth the sum of $15.00 per month; the total wages of the said Robert Coon being $100.00 per month.

(6) The respondent had actual knowledge of the happening of said accident on August 4th, 1915, and the loss of the said steam-tug "Elsie K" and the death of the said Robert Coon.

(7) That the death of the said Robert Coon was caused through an accident arising out of and in the course of his employment.

(8) The said Robert Coon left dependent upon him your petitioner, his widow, and two children, Myrtle Coon, three years of age, and Mildred Coon, one year of age.

6 (9) Your petitioner claims from the respondent, James Kennedy, doing business under the name of Kennedy's Towing Line, compensation for herself and her two said dependent children amounting to forty-five per cent. of the wages of the said Robert Coon for three hundred weeks from the date of his death, August 4th, 1915, and $100.00 on account of decedent's funeral bill, and for such other relief in the premises as may be just.

REBECCA COON,
Petitioner.

McDERMOTT & ENRIGHT,
Attorneys of Petitioner.

STATE OF NEW JERSEY,
County of Hudson, ss:

Rebecca Coon, of full age being duly sworn according to law upon her oath deposes and says that she is the person mentioned in the foregoing petition; that she has read the same and knows the contents thereof and that the matters and things therein contained are true to the best of her knowledge, information and belief.

REBECCA COON.

Subscribed and sworn to before me this 26th day of February, 1916.

HENRY A. OETJEN,
Notary Public of N. J.

7 *Answer.*

Filed May 19, 1916.

Union County Court of Common Pleas.

REBECCA COON, Petitioner,

vs.

JAMES KENNEDY, Trading as Kennedy's Towing Line, Respondent.

On Petition. Answer.

The respondent, answering the petition filed in the above stated cause, says that:

(1) He admits paragraphs one, six and seven of the petition.

(2) He admits the occupation of petitioner's intestate, and that the "Elsie K." was on a journey from Brooklyn, New York, to a port in New Jersey at the time it sank; but denies the balance of paragraph two.

(3) He admits that portion of paragraph three, referring to the registry of the "Elsie K," and also that the respondent resides in the State of New Jersey, having a place of business in said State of New Jersey.

(4) He denies paragraph four of the complaint.

(5) He denies that petitioner's intestate was in receipt of wages of $100.00 per month.

(6) He leaves petitioner to his proof of paragraph eight of petition.

8 (7) He denies that petitioner is entitled to compensation as demanded in paragraph nine of the petition.

And the respondent, further answering, says:

That the Union County Common Pleas Court has no jurisdiction to hear or determine the rights of the parties to the within action, and that the petitioner cannot invoke the Compensation Act of the State of New Jersey for the purpose of obtaining any compensation or damages against this respondent.

KALISCH & KALISCH,
Att'ys for Respondent.

Dated April 8, 1916.

STATE OF NEW JERSEY,
County of Essex, ss:

Isidor Kalisch, being duly sworn upon his oath deposes and says, that he is the attorney for the respondent in the foregoing answer, and the agent in this behalf, that he has read the foregoing answer and that the matters and things therein contained are true to the best of his knowledge and belief.

ISIDOR KALISCH.

Sworn and subscribed to before me this day of April, 1916.
ABNER KALISCH,
Master in Chancery of N. J.

9 *Conclusions.*

Filed June 1, 1916.

Union Common Pleas.

REBECCA COON, Petitioner,

vs.

JAMES KENNEDY, Doing Business under the Name of the Kennedy Towing Line, Respondent.

J. D. Carpenter (McDermott & Enright), for Petitioner.
Kalisch & Kalisch, for Respondent.
Hearing, May 19th, 1916.

CONNOLLY, *J.*:

This proceeding was instituted by Rebecca Coon, the widow of Robert Coon, deceased, to recover compensation under the Workman's Compensation Act, (P. L. 1911, p. 134) and the supplements thereto and amendments thereof, for herself and two infant children, said children being one and three years of age, respectively.

The facts show that for some years prior to August 4, 1915, Robert Coon had been employed on the boats of the respondent and received wages to the amount of one hundred dollars a month. The testimony does not show where the hiring of the deceased took place. The tugboat "Elsie K," on which he was employed, was owned by respondent, who is a resident of the City of Elizabeth, and
10 was registered at the Custom House in the City of Newark, in this State, its home port. On August 4, 1916, while the tugboat was on its way from New York toward the City of Elizabeth, a violent storm swamped it, and it sunk in water to a depth of thirty-three or thirty-five feet. Shortly before it sank, Coon called on the fireman to make his escape, and jumped overboard. He was drowned. The tugboat was running when he left it, and proceeded some distance before it went down. The respondent now contends that the deceased was drowned in New York waters, and not in the waters of New Jersey, and that the petitioner's claim for compensation, if she has a right to recover compensation, should be submitted to the courts of New York.

John W. Schlig, who was employed as fireman on the tugboat, swore that when it went down, it was five hundred feet from the shore of Constable Hook, in New Jersey, and that Coon went down, at a distance of five hundred feet from Constable Hook. This witness also testified that the derrick which raised the tug, put out anchors and fastened its lines to the dock at Constable Hook. Kennedy, the respondent, who was on the scene where the boat was raised, said that

she lay five hundred feet from the New Jersey shore, and half a mile from the Staten Island shore, and that the shores at that point are about three-quarters of a mile apart.

The two witnesses for the respondent contradicted the foregoing statements. William Bulke testified, that he is a diver, and that the tugboat foundered at a distance of seven or eight hundred feet from Constable Hook, that she was thirty-five feet under water, and
11 that his derrick boat was kept in position by anchors. When asked whether there were hawsers from his boat to the dock, he made answer saying that the captain would answer that question. John Blomber, who was employed on the derrick boat, swore that the tugboat went down seven or eight hundred feet from the outer side of the dock, and that no lines were used from his boat to the dock.

Nelson, a witness who was employed in the tugboat on the day when it foundered, swore that the deceased jumped from the tug at a point five hundred feet out from the coal dock on Staten Island, and that the boat ran for about fifteen minutes, after the deceased jumped off, toward Constable Hook.

It will be seen that the testimony is conflicting, and if the deceased was drowned in New York waters, the proceeding must be dismissed, and the petitioner should be left to pursue her remedy in the New York courts. But I regard the testimony of Kennedy, the respondent, of great importance. He says that at the point where the boat was raised, the distance between the shore of New Jersey and New York, (Staten Island) is three-quarters of a mile, and that the boat foundered at a point five hundred feet from the New Jersey shore. If deceased jumped from the boat, according to Nelson, when it was five hundred feet from the coal docks in Staten Island, then the boat went a distance of from thirty-four to thirty-five hundred feet before it went down. I do not think that the boat could have proceeded this distance, as she was going down when the deceased jumped into the water. I rely on the respondent's statement as to distance, because he is well acquainted with the waters in
12 and around New York Bay, and owns five tugboats which he operates on these waters. And again, the testimony of Schlig is contradictory of that given by Nelson, Schlig swearing that deceased went into the water when he was drowned, about five hundred feet from the New Jersey shore.

At the hearing, a "Map of the boundary line between the States of New York and New Jersey in lands under water in Kill von Kull and New York Bay, &c.," attached to a "Report of proceedings of the New Jersey Boundary Commission, appointed to lay out by stakes and buoys the true boundary line between New York and New Jersey," was used. The map was agreed upon by commissioners appointed by the States of New York and New Jersey and is authentic as to the lines and boundaries which it sets forth. The boundary line between New York and New Jersey lies about in the middle of the Kill von Kull, where that stream runs into New York Bay, but at the mouth of the Kill, turns from a northeasterly direction and runs due east for about a mile and a half toward the Long Island shore. On the north, or New Jersey side of this line, the New Jersey shore recedes in a northwesterly direction, while the

Staten Island shore recedes in a southeasterly direction, leaving an immense distance between the shores of the two States. The foundering of the respondent's tug took place at this point. It did not happen on the Kill, as the water there is very deep, and runs through a narrow channel, carrying the waters of the Newark Bay, into which empty the Passaic and Hackensack rivers, and a part of the waters of the Staten Island Sound. On the north of the
13 boundary line, at the mouth of the Kill von Kull, the waters are generally only twenty feet deep, but near the boundary line runs to a depth of thirty and thirty-three feet. On the south, or New York (Staten Island) side of said boundary line, the depth of the water is from forty-one to forty-eight feet, and the map, and the soundings which it contains, go to sustain the testimony of Kennedy, the respondent. Now, as the tugboat sunk to a depth of thirty-three or thirty-five feet, it is evident that the sinking took place in New Jersey waters, and not in the Kill or deep water.

From a careful study of the testimony and of the map, I am led to the conclusion that the drowning of the deceased and the sinking of the boat, both happened in New Jersey waters.

The respondent is entitled to forty-five per centum of the weekly wages of the deceased for herself and her two children, for three hundred weeks, and in addition thereto, to the sum of one hundred dollars for funeral expenses.

I will allow a counsel fee of two hundred dollars to the attorneys of the petitioner, to be paid as follows: One hundred dollars from the amount now due the petitioner, and the balance in weekly sums of two dollars per week, until the whole amount is paid. Costs will be awarded to the petitioner.

Judgment may be entered accordingly.

JAMES C. CONNOLLY,
Judge.

Dated June 1, 1916.

14 *Determination and Finding of Facts.*

Filed June 17, 1916.

Union County Court of Common Pleas.

REBECCA COON, Petitioner,

vs.

JAMES KENNEDY, Doing Business under the Name of Kennedy's Towing Line, Respondent.

On Petition for Compensation: Determination and Finding of Facts.

A petition having been heretofore filed in the above stated matter praying that the Court would decide the matters in dispute between the parties hereto and for payment of the compensation to which the petitioner might be entitled by virtue of the terms and provisions of

an act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the supplements thereto and amendments thereof, and the time and place for the hearing of the said petition having been fixed, to wit, March 24th, 1916, and the said respondent having filed his answer, and the said hearing having been adjourned to May 19th, 1916, at the Court House in
15 the City of Elizabeth, and it appearing to the Court that a copy of the said petition and the order fixing the time and place for the hearing were duly served upon the respondent, and the respondent and the petitioner appearing in court before me at the time and place fixed for the final hearing by the said adjournment, and I having heard the testimony of the witnesses for the petitioner and respondent, and having considered the said testimony and the argument of counsel thereon,

I do hereby determine as follows: That Robert Coon, was in the employ of the respondent August 4th, 1914, and had been in his employ for a considerable time prior thereto; that the said Robert Coon met his death August 4th, 1915, by an accident arising out of and in the course of his employment with the respondent, and that the respondent had actual notice of and knowledge thereof; that the said Robert Coon at the time of his death aforesaid and for a considerable time prior thereto was receiving $100 per month wages; that the said Robert Coon was a fireman employed on the tugboat "Elsie K" owned by the respondent; that the said "Elsie K" was registered pursuant to the provisions of the Act of Congress at the port of Newark, which was her home port in the State of New Jersey at the time of the accident and for many years prior thereto; that the residence and principal place of business of the respondent is at Elizabeth, Union County, New Jersey.

I further find as a fact that the said Robert Coon was employed a large part of the time in the State of New Jersey and that his employment was under the laws of the State of New Jersey; that the residence of the said Robert Coon at the time of his decease
16 was in the City of Brooklyn, New York, and that his employment on the tugboat "Elsie K" owned by the respondent was in both the waters of New York and New Jersey; that his employment in the State of New Jersey was fully one-half of the time that he werked for the respondent; that the said Robert Coon was paid with checks of the respondent drawn on a bank in the State of New Jersey, and that the employment of the said Robert Coon was not under the laws of any other State than the State of New Jersey.

I further find as a fact that the said Robert Coon met his death when the tugboat "Elsie K" foundered in a storm on the morning of August 4th, 1915, when the said "Elsie K" was in the waters of the State of New Jersey, over lands of the State of New Jersey, and when on a voyage to Elizabeth, New Jersey; that the said tugboat sunk about five hundred feet from the New Jersey shore in New York Bay, and the said Robert Coon met his death at or about the time the

said tugboat sank and in the waters of New Jersey and over lands of the State of New Jersey.

I further find as a fact that the said Robert Coon left dependent upon him Rebecca Coon, his widow, and two children, Myrtle Coon, three years of age, and Mildred Coon, one year old, all of whom were actual dependents of the said Robert Coon and residing with him in the City of Brooklyn, New York, and who now reside in Brooklyn, New York; that the petitioner is entitled to recover forty-five per cent. of the wages of the said Robert Coon, $100.00, or $10.00 per week for a period of three hundred weeks, commencing August 4, 1915, and $100.00 funeral expenses.

17 The Court allows to McDermott & Enright, attorneys of the petitioner, counsel fees of $200.00, $100.00 of which shall be paid out of the payments due on the date of the entering of judgment, and the balance to be paid at the rate of $2.00 per week out of the payments hereafter to be due until the whole sum of $200.00 shall be paid.

The petitioner is entitled to recover costs in addition to the counsel fee above mentioned.

It is thereupon on this seventeenth day of June, 1916, on motion of McDermott & Enright, attorneys of the petitioner,

Ordered that the respondent do pay to the petitioner the sum of $100.00 for funeral expenses of the said Robert Coon, and the sum of $10.00 per week for three hundred weeks, commencing August 18, 1915, all the payments for the petitioner and her two children to be made to the said petitioner.

It is further ordered that petitioner pay to McDermott & Enright, her attorneys, out of the compensation awarded to her the sum of $200.00 for their fees, $100.00 of which shall be paid out of the compensation payable to the date hereof, the balance to be paid at the rate of $2.00 per week out of the compensation hereafter payable, until the whole sum of $200.00 shall be paid.

It is further ordered that respondent pay to McDermott & Enright their costs of suit to be taxed.

It is further ordered that judgment be entered in favor of the petitioner and against the respondent for the sum of $100.00 funeral expenses, and the sum of $10 per week for three hundred weeks, together with costs.

JAMES C. CONNOLLY,
Judge Court of Common Pleas.

Rule actually entered June 17, 1916, at 11:50 A. M.

18 New Jersey Supreme Court.

JAMES KENNEDY, Trading as Kennedy's Towing Line, Prosecutor,

vs.

COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF UNION and Abram P. Morris, Clerk of said Court, and Rebecca Coon, Administratrix, &c., of Robert Coon, Deceased, Defendants.

On Certiorari.

Reasons.

The prosecutor presents the following reasons for setting aside the proceedings, determination and statement of facts and judgment brought before this Honorable Court by the writ of certiorari in the above entitled cause:

1. There were no facts adduced at the hearing to support the finding of the trial court that petitioner's intestate was drowned in the waters of the State of New Jersey.

2. There was no proof that petitioner's intestate was drowned in the waters of the State of New Jersey, but on the contrary it appeared that he was drowned in New York waters.

3. The trial court's finding as to the point at which the "Elsie K" sank was not based upon any evidence adduced at the hearing.

19 4. The Court erroneously refused to allow respondent to ask the following question: "The reason why you determined to take insurance in one place or another, was by reason of the fact that your attorney advised you to do so, isn't that correct?"

5. The trial court made an erroneous conclusion in finding that, "If deceased jumped from the boat, according to Nelson, when it was five hundred feet from the coal dock on Staten Island, then the boat went a distance of from thirty-four to thirty-five hundred feet before it went down. I do not think that the boat could have proceeded this distance as she was going down when the deceased jumped into the water."

6. The trial court erroneously found in his conclusions as follows: "And again the testimony of Schlig is contradictory of that given by Nelson, Schlig swearing that deceased went into the water where he was drowned about five hundred feet from the New Jersey shore."

7. The following conclusion is not based upon any evidence: "It did not happen in the Kill, as the water there is very deep and runs through a narrow channel, carrying the waters of the Newark Bay, into which empty the Passaic and Hackensack Rivers, and a part of the waters of the Staten Island Sound."

8. The following finding is erroneous as not being based upon any facts adduced at the hearing: "On the north of the boundary line, at the mouth of the Kill von Kull, the waters are generally only twenty feet deep, but near the boundary line run to a depth of thirty

and thirty-three feet. On the south, or New York side of said boundary line, the depth of the water is from forty-one to forty-
20 eight feet, and the map and soundings which it contains, go to sustain the testimony of Kennedy, the respondent. Now, as the tugboat sunk to a depth of thirty-three or thirty-five feet, it is evident that the sinking took place in New Jersey waters, and not in the Kill or deep water."

9. The following finding is erroneous as not being based upon any facts adduced at the hearing: "From a careful study of the testimony and of the map, I am led to the conclusion that the drowning of the deceased and the sinking of the boat, both happened in New Jersey waters."

10. Because the map which was used by the Court in determining upon the conclusions to be filed in this matter, was not introduced in evidence and at most was used for the purpose of fixing the boundary line between New York and New Jersey, and therefore it was not proper for the trial court to use the soundings which the conclusions set forth appear on the said map, as neither counsel nor the court referred to the soundings during the trial and there was no proof of the correctness of the said map with reference to the depths which the court finds, appear in the said map.

11. The following finding is erroneous as not being based upon any facts adduced at the hearing: Because the facts on which the conclusions of the court are based, do not support a recovery of any compensation or funeral expenses by reason of the death of the petitioner's intestate.

12. Because the conclusions in itself was a determination of facts and provided that "Judgment may be entered accordingly," and therefore, the entire determination of facts as presented by the
21 petitioner and differing from the conclusions was improperly and erroneously allowed to be filed.

13. Because the determination of facts as filed should have contained the same findings of facts as the conclusions filed by the court.

14. Because the court refused upon the argument of a motion for the modification of the determination of facts, as filed by the petitioner, to modify the same in the following particulars:

Request No. 1—Respondent maintains that the following determination of fact, namely, "That the residence and principal place of business of the respondent is at Elizabeth, Union County, New Jersey," be amended to read, "That the residence and a place of business of the respondent is at Elizabeth, Union County, New Jersey," the respondent having also another place of business in New York City. Request denied because the change is immaterial.

Request No. 2—Respondent maintains that the following determination of fact, namely, "That the said Robert Coon was employed a large part of the time in the State of New Jersey, and that his employment was under the Laws of New Jersey," should be stricken out as not conforming with the conclusions filed by the court reading as follows: "The testimony does not show where the hiring of the deceased took place." Request denied, because the court feels that the employment was under the Laws of New Jersey, regardless of the place of hiring.

Request No. 3—Respondent maintains that the following determination of fact, namely, "That his (Coon's) employment in the State of New Jersey was fully one-half of the time that he worked for the respondent," be amended to read, "That his (Coon's) em-
22 ployment consisted of work both in the State of New Jersey, New York and other States." Request denied.

Request No. 4—Respondent maintains that the following determination of fact, namely, "That the employment of the said Robert Coon was not under the Laws of any other State than the State of New Jersey," be eliminated, because of the fact that the court in his conclusions found as follows: "The testimony does not show where the hiring of the deceased took place." Request denied.

Request No. 5—Respondent maintains that the following determination of fact, namely, "I further find as a fact that the said Robert Coon met his death when the tugboat 'Elsie K' foundered," be amended to read, "I further find as a fact that the said Robert Coon met his death somewhere near the time when the tugboat 'Elsie K' foundered." Request denied.

Request No. 6—That the determination of facts and order should contain the following finding: "The testimony does not show where the hiring of the deceased took place." (which finding was set forth in the conclusions filed by the trial court). Request denied.

KALISCH & KALISCH,
Attorneys of Prosecutor.

23 *Notice of Appeal.*

(Served Oct. 26, 1917; Filed Oct. 30, 1917.)

New Jersey Supreme Court.

REBECCA COON, Petitioner-Appellant,

vs.

JAMES KENNEDY, Trading as Kennedy's Towing Line, Respondent-Appellee.

To Messrs. Kalisch & Kalisch, Attorneys of Respondent:

Please take notice that Rebecca Coon, the above named petitioner, does hereby appeal to the New Jersey Court of Errors and Appeals from the judgment of the New Jersey Supreme Court entered in the above entitled cause the 20th day of October, 1917, reversing the judgment of the Union County Court of Common Pleas in favor of the petitioner.

Further take notice that the following are the reasons which will be urged for the reversal of the judgment of the Supreme Court:

(1) Because the Supreme Court reversed the judgment of the Union County Court of Common Pleas.

(2) Because the Supreme Court held that the Union County Court of Common Pleas did not have jurisdiction to enter the judgment and determination made by it below.

(3) Because the Supreme Court held that the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) is in conflict with Article 3, Section 2, of the United States Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

(4) Because the Supreme Court held that the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) is in conflict with Article 1, Section 8, of the United States Constitution, giving Congress power to make all laws necessary and proper to carry into execution powers vested in the Federal Government.

(5) Because the Supreme Court held that the Union Common Pleas did not have jurisdiction in this cause for the reason that under the provisions of the Judicial Code of the United States, the United States District Courts have exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction.

(6) Because the Supreme Court held that the question of the jurisdiction of the Union Common Pleas Court would be considered despite the fact that it had not been raised in the trial court, whereas the Supreme Court should not have considered such question.

(7) Because the Supreme Court did not hold that since the question was not raised in the trial court that this cause was within the exclusive jurisdiction of the admiralty courts, such question would not be considered in the Supreme Court.

(8) Because the Supreme Court erred in not holding that proceedings under the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) are not in conflict with the jurisdiction of the courts of admiralty of the United States, for the reason that the only exclusive jurisdiction of the admiralty courts is in proceedings in rem, and is not exclusive in proceedings in personam, and because the proceedings under the Workmen's Compensation Act of the State of New Jersey in this cause is not a proceeding in rem wherein the courts of admiralty of the United States have exclusive jurisdiction, but on the contrary is a proceeding in personam, saved to the State courts.

(8½) Because the Supreme Court did not hold that the proceedings in this case under the provisions of the Workmen's Compensation Act (P. L. 1911, p. 134) were not a burden on interstate commerce, but on the contrary were merely the enforcement of remedies reserved to the petitioner under the valid exercise by the State of New Jersey of police powers reserved to the State of New Jersey under the Constitution of the United States.

(9) Because the Supreme Court did not hold that the proceedings under the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) were essentially different from those under the Workmen's Compensation Act of the State of New York, and that the decision of the Supreme Court of the United States in Jensen vs. Southern Pacific Company did not control the decision of this cause.

(10) Because the Supreme Court did not hold that the granting of compensation by the Union Common Pleas below was merely the enforcement of an agreement made between Kennedy and petitioner's intestate pursuant to the terms of the Workmen's Compensation Act of the State of New Jersey and not therefore the exercise of

any jurisdiction reserved by the Constitution and Laws of the United States exclusively to courts of the United States.

(11) Because the rights of the States to enforce remedies under Workmen's Compensation Statutes (particularly under P. L. 1911, p. 134 of the State of New Jersey) have been expressly reserved by Congress.

Respectfully yours,

McDERMOTT & ENRIGHT,
Attorneys of Petitioner.

26 *Opinion of Supreme Court.*

New Jersey Supreme Court, February Term, 1917.

JAMES KENNEDY, Trading as Kennedy's Towing Line, Respondent-Prosecutor,

vs.

REBECCA COON, Petitioner-Respondent.

Certiorari Removing Judgment of Union Common Pleas.

Argued February Term, 1917. Decided June Term, 1917.

Kalisch & Kalisch, for Prosecutor.
McDermott & Enright, for Defendant.

Argued before Justices Swayze, Minturn and Kalisch.

The opinion of the Court was delivered by Minturn, J.

The writ of certiorari brings up the proceedings in a workman's compensation case, in the Union County Common Pleas, wherein judgment was rendered for petitioner, whose husband lost his life by an accident, as the trial court found, arising out of and in the course of his employment with prosecutor.

The prosecutor is in the tow-boat business, and is engaged in interstate commerce, between New York and New Jersey. He resides in Elizabeth, where he has his office and principal place of busi-
27 ness. One of his steam tugs, the "Elsie K," was registered in the Customs Office in Newark pursuant to section 4141, R. S. U. S. Fed. Stat. Ann., Vol. 7, p. 16.

Robert Coon, petitioner's husband, had been employed as fireman on the boat, and was drowned when she foundered while on a voyage from Brooklyn to Elizabeth, August 4, 1915. She went down within about five hundred feet of the New Jersey shore at Constable Hook. The Court below found as a fact, and there was evidence to support it, that the tug sank in New Jersey waters, and that the deceased was drowned within the jurisdiction.

Since this case was submitted, two causes involving questions of the same general legal import have been decided by the Federal

Supreme Court. The case of the Southern Pacific Company vs. Jensen, U. S. Supreme Court, ad. op. 1916, Oct. Term, 1916, p. 524, involved the inquiry whether the workmen's Compensation Act of New York was in conflict with Art. 3, sect. 2, of the Federal Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and article 1, sect. 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the Federal government; and the United States Judicial Code, sections 24 and 256, giving Federal District Courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction; as well as with the general policy of Congress to encourage investments in ships, manifested by various Congressional enactments imposing a limitation of liability upon the owners of vessel property.

The majority opinion of a divided court held that such a conflict of legislative authority existed, and that the New York Act was consequently invalid so far as it attempts to impose liabil-
28 ity upon the owner of an ocean going steamship plying between New York City and the City of Galveston, Texas, for an injury resulting in the death of a longshoreman killed while at work upon the vessel.

This determination would obviously be dispositive of the claim in the case sub judice, since the fact is conceded that the boat upon which this decedent was employed was engaged in interstate commerce between the port of Brooklyn in the State of New York and Elizabeth, in this State. But the Southern Pacific case was followed at the same term of the Federal Court by Valley Steamship Company vs. Wattawa, and the same company against Mraz, reported in the same number of advance opinions at page 523. This later adjudication imposes a practical qualification or limitation upon the general application in practice of the rule declared by the former adjudications to the effect that the claim of exclusive Federal jurisdiction will not be recognized as a basis for a writ of error, unless the question shall have been raised in the trial court, and is presented as a basis of appeal, where the State appellate tribunal is circumscribed in its discussion of the case to errors appearing on the record, citing in support of this general rule of practice, Mutual Life Ins. Co. vs. McGraw, 188 U. S., 291.

The general rule of practice in this State relative to matters determinable in this Court, and in the Court of Errors, has been settled in accordance with the rule promulgated by the Federal Supreme Court, with the additional qualification that the rule shall not apply, whereas in this case the question presented is one dealing with the jurisdiction of the Court, or the general public policy of the State.

29 Obviously, therefore, the question of jurisdiction is involved in this controversy in view of the Federal decisions to which we have referred, and under our practice is not eliminated by the failure of the record to present it. The result is, that in reaching a result, our determination must be controlled by the Federal decisions referred to, which leads to a reversal of the judgment under review.

Judgment of Supreme Court.

New Jersey Supreme Court.

JAMES KENNEDY, Trading as Kennedy's Towing Line, Respondent-Prosecutor,

vs.

REBECCA COON, Petitioner-Respondent.

Order on Reversal.

This matter coming on to be heard before the New Jersey Supreme Court, at the February Term, 1917, and Kalisch & Kalisch appearing for the prosecutor, and McDermott & Enright, for the defendant, and the argument of counsel having been considered, it is, on this 20th day of October, nineteen hundred and seventeen.

Ordered, that the judgment under review be reversed, with costs.

By the Court:

JAMES F. MINTURN,
J. S. C.

30 Doc. No. 4274.

STATE OF NEW JERSEY:

Court of Errors and Appeals, November Term, 19—.

Appeal from Supreme Court.

Error to — Court.

REBECCA COON, Appellant,

and

JAMES KENNEDY, Trading as Kennedy's Towing Line, Respondent.

No. 104 of Nov. Term, 1917.
Date —— —, 1918.
—— ——, Chancellor, presiding.
Opinion by the Court below.

Check list.	Affirm.	Reverse.	Modify.
The Chancellor	1	....	....
" Chief Justice	1	....	....
Mr. Justice Garrison	1	....	....
" " [Swayze,]*	..	....	....
" " Trenchard	1	....	....
" " Parker	1	....	....
" " Bergen	1	....	....
" " [Minturn,]*	..	....	....

"	" [Kalisch,]*	..	....	....
"	" Black	1	....	....
Judge	White	1	....	....
"	[Terhune,]*	..	....	....
"	Heppenheimer	1	....	....
"	Williams	1	....	....
"	[Taylor,]*	..	....	....
"	Gardner	1	....	....
	Totals	..	....	....

[*Words and figures enclosed in brackets erased in copy.]

31 New Jersey Court of Errors and Appeals, No. 104, Nov. Term, 1917.

REBECCA COON, Petitioner-Appellant,

vs.

JAMES KENNEDY, Respondent-Appellee.

Argued Nov. 26, 1917. Decided March 4, 1918.

The amendment of October 6, 1917 to the Federal Judicial Code, saving to claimants the rights and remedies under the workmen's compensation act of any state, is prospective, and does not validate a compensation action begun in a state court before its passage and which at the time of such passage the state court had no jurisdiction to entertain.

Appeal from Supreme Court, whose opinion is reported in —.

For the appellant, James D. Carpenter, Jr.

For the respondent, Isidor Kalisch.

The opinion of the court was delivered by

PARKER, *J.*:

We concur in the result reached by the Supreme Court, that the federal jurisdiction over the case presented was exclusive, and for the reasons given in the opinion of that court.

It is argued here that an amendment of sections 24 and 256 of the Federal Judicial Code, which amendment was approved October 6, 1917 by the President of the United States and became a law upon such approval, operates to save the jurisdiction of the court of common pleas to deal with this case as a workmen's compensation case. To this we do not agree. The fatal accident occurred on August 4, 1915; the proceeding in the common pleas was instituted March 24, 1916, and the determination of that court filed on June 17,

32 1916. The certiorari was argued in the Supreme Court at the February Term 1917 and decided in the June Term of that year; just when, does not appear except that the rule for reversal was signed October 20, 1917. The position of appellant necessarily must be that the federal amendment which took effect October

6, 1917, is retroactive to the extent of supporting a claim of workmen's compensation based on an accident which occurred over two years before its enactment and which claim our courts had no jurisdiction to entertain up to within a few days before the reversal on that ground in our Supreme Court. In view of the accepted rule that statutes are to be construed as prospective in their operation unless there is a clearly expressed legislative intent to the contrary (Frelinghuysen v. Morristown, 77 N. J. L. 493; In re St. Michael's Church, 76 N. J. Eq. 524-532) there should be some legislative declaration indicating the intent of congress that actions previously begun in the state courts without jurisdiction are to acquire a status therein if still pending. We find no such intent even intimated. Section 24 of the Judicial Code in its original form began by providing that "the district courts shall have jurisdiction as follows:" and in clause 3 mentioned civil cases of admiralty and maritime jurisdiction saving common law remedies. Section 256 provided that the jurisdiction of the federal courts should be exclusive of that of the state courts, inter alia, in cases of admiralty and maritime jurisdiction, saving common law remedies. The amendment of October 6, 1917 re-enacted these clauses, adding to the saving clause in each
place the words "and (saving) to claimants the rights and
33 remedies under the workmen's compensation law of any
state". This indicates, at the most, no more than an intent to confer the particular jurisdiction on state courts to entertain compensation cases thereafter begun, but it is very far from providing that extra-jurisdictional actions are to acquire a status if not theretofore terminated.

The judgment will be affirmed.

Endorsed: "Filed Mar. 4, 1918. Thomas F. Martin, Secretary of State."

34 New Jersey Court of Errors and Appeals, March Term, 1918.

Between

REBECCA COON, Appellant,

vs.

JAMES KENNEDY, Respondent.

On Appeal from Supreme Court.

Order on Affirmance of Judgment.

This cause having been duly argued at the November Term, 1917 of this court by Kalisch & Kalisch of counsel for the appellant, and McDermott & Enright of counsel for the respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this 4th day of March in the year of our Lord one thousand nine hundred Eighteen ordered and adjudged that the

judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

KALISCH & KALISCH,
Attorney- for Respondent.

Endorsed: "Filed Mar. 11, 1918. Thomas F. Martin, Clerk."

35 [Endorsed:] New Jersey Court of Errors and Appeals. November Term, 1917. Rebecca Coon, Appellant, vs. James Kennedy, Respondent. On Appeal from Supreme Court. Order Affirming Judgment. —— ——, Att'y. Filed —— —, 191-. —— ——, Clerk.

36 UNITED STATES OF AMERICA, *ss:*

[Seal of the U. S. District Court.]

The President of the United States to the Honorable Judges of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals of the State of New Jersey before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in an action between Rebecca Coon, appellant, and James Kennedy, respondent, manifest error hath happened to the great damage of Rebecca Coon, appellant, as by her complaint appears; we being willing that error, if any hath been, should be duly corrected and full and complete justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the twentieth day of March, instant; in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and Constitution of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the fifteenth day of March, A. D. Nineteen hundred and Eighteen.

GEORGE T. CRANMER,
Clerk of the United States District Court
for the District of New Jersey,
By ROBERT S. CHEVIRER,
Deputy.

37 [Endorsed:] Allowed by E. R. Walker, Presiding Judge of the New Jersey Court of Errors and Appeals. Filed March 15th, 1918. Thomas F. Martin, Clerk.

38 New Jersey Court of Errors and Appeals.

REBECCA COON, Appellant,

vs.

JAMES KENNEDY, Respondent.

Assignments of Error.

Rebecca Coon, by McDermott & Enright, her attorneys, comes and files the following assignments of error upon which she will rely, and says:

(1) That in the record and proceedings in the above cause there is manifest error in this, that by the record aforesaid it appears that the judgment herein was given in favor of the appellant and against the respondent, and that by the judgment of said Court of Errors and Appeals the final judgment of the Supreme Court of New Jersey was affirmed, whereby the jurisdiction of the Union County Court of Common Pleas and the Judge of said Court, under an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, (being Chapter 95, P. L. 1911) and the amendments thereof and supplements thereto, was denied, notwithstanding the fact that at the time of the accident to appellant's decedent, for whose death this action was brought, appellant's decedent was employed by
39 the respondent in the State of New Jersey on a domestic vessel registered at the Port of Newark in the State of New Jersey, and met his death through an accident arising out of and in the course of his employment with the respondent within the State of New Jersey, and notwithstanding the fact that the said Workmen's Compensation Act of the State of New Jersey as above entitled was not in conflict with either Article 3, Section 2 of the Federal Constitution or Article 1, Section 8 of the Federal Constitution, or with Sections 24 and 256 of the United States Judicial Code, the decision of the said Court of Errors and Appeals of New Jersey held that the said Workmen's Compensation Act of the State of New Jersey was in conflict with the provisions of the Federal Constitution and with the United States Judicial Code, and denied the jurisdiction of the said Union County Court of Common Pleas to give its judgment as aforesaid in favor of the appellant and against the respondent.

(2) An Act of Congress approved October 6, 1917 entitled "An Act to amend Sections 24 and 256 of the Judicial Code relating to the jurisdiction of the District Courts, so as to save the claimants the rights and remedies under the Workmen's Compensation Law of any State," expressly saved to the appellant her rights and remedies under the said Statute of the State of New Jersey, (being Chapter 95 of the Laws of 1911) and the New Jersey Court of Errors and Ap-

peals erred in holding that the said Act of Congress operated prospectively and not retrospectively.

(3) Said Statute of the State of New Jersey, (being Chapter 95 of the Laws of 1911) with the amendments thereof and supplements thereto, was not in violation of and in conflict with the admiralty and maritime jurisdiction of the United States, or of the District Courts of the United States, and the New Jersey Supreme Court and the Court of Errors and Appeals of New Jersey erred in so holding.

(4) Said Statute of the State of New Jersey, (being Chapter 95 of the Laws of 1911), and the amendments thereof and supplements thereto, was passed by the Legislature of the State of New Jersey under its police powers and created in favor of the appellant a common law remedy or a remedy in the nature of a common law remedy, which was expressly saved by Congress by Sections 24 and 256 of the Judicial Code, and such remedy did not conflict with the admiralty and maritime jurisdiction of the United States or the United States District Courts, and the denial to the appellant of such rights and remedies under such statute was erroneous.

The appellant, Rebecca Coon, therefore prays that the judgment aforesaid may be reversed, annulled and for nothing holden and that she may be restored to all things which she may have lost by occasion of said judgment.

McDERMOTT & ENRIGHT,
Attorneys of Appellant.

Endorsed: "Filed Mar. 15, 1918. Thomas F. Martin, Clerk."

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States to James Kennedy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the twentieth day of March, A. D. Nineteen hundred and Eighteen, pursuant to a writ of error filed in the Clerk's Office of the Court of Errors and Appeals of the State of New Jersey, wherein Rebecca Coon is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States of America, this fifteenth day of March, A. D. Nineteen hundred and Eighteen.

E. R. WALKER,
Presiding Judge of the New Jersey Court of Errors and Appeals.

Attest:
THOS. F. MARTIN,
Clerk.

42 [Endorsed:] Service of this citation and receipt of a copy thereof for defendant in error is hereby acknowledged this 16th day of March, 1918. Kalisch & Kalisch, Attorneys of Defendant in Error. Filed March 22, 1918. Thomas F. Martin, Clerk.

43 Supreme Court of the United States.

REBECCA COON, Plaintiff in Error,

vs.

JAMES KENNEDY, Defendant in Error.

Stipulation.

It is hereby stipulated between counsel for the respective parties that the foregoing portions of the record shall be printed and none other; that none of the testimony shall be printed excepting the following:

Testimony of JOHN W. SCHLIG, Jr., a witness for petitioner:

Q. Had you yet got into Kill von Kull?
A. Just about entering it.

Cross-examination:

Q. Where were you hired?
A. At Pier 6, East River.
Q. By whom?
A. Chief Engineer of the "Elsie K."
Q. Pier 6 of the East River is——
A. New York City.

Testimony of REBECCA COON:

Q. Do you remember your husband getting a telegram telling him he should report at the boat in Brooklyn?
A. When?
Q. From Mr. Kennedy some years ago?
A. Yes.
Q. Telling him to report at Brooklyn, or was it South Brooklyn, which was it?
A. It was the New York Office.

Respondent, JAMES KENNEDY, as a witness on his own behalf, testified as follows:

Q. Do you know where he (Coon) lived?
A. I know he lived in Brooklyn.
Q. What was the starting point with reference to your boats going out?—The "Elsie K." going out?
A. Well, wherever she tied up at night she started in the morning.

44 Q. Where was the beginning of your voyage after one job was complete?

A. Well, sometimes pier six and other places; they would call up on the telephone, we would start them from where they were.

Q. Pier six in New York?

A. New York.

On cross-examination by petitioner's counsel, Mr. Kennedy testified:

Q. You were asked this question by Mr. Connor, counsel for the commission: (The New York commission in a proceeding where Mrs. Coon claimed compensation under the New York Act.) "You claim that the widow, Mrs. Coon, is entitled to compensation under the New Jersey law, and not under the New York Law." And did you not answer this way to that question: "Yes, sir; we are insured in New Jersey and not in New York?"

A. I told him we were insured in New Jersey as I understood. Yes, sir; I said that distinctly.

Q. Did you not say also that you claimed the widow was entitled to compensation under the New Jersey law?

A. No, he did. I don't recollect that part of it. I did say we were insured in New Jersey.

It is stipulated that no more of the testimony than the foregoing need be printed.

This stipulation shall be printed in the record.

JAMES D. CARPENTER, JR.,
Attorneys of Plaintiff in Error.
KALISCH & KALISCH,
Attorneys of Defendant in Error.

Notice.

Supreme Court of the United States

OCTOBER TERM, 1918—No. 398.

REBECCA COON,
Plaintiff-in-Error,
vs.
JAMES KENNEDY,
Defendant-in-Error.

To ISIDOR KALISCH, ESQ.,
Attorney of Defendant-in-Error:

Take notice of a motion before the Supreme Court of the United States, at the Capitol, Washington, D. C., on Tuesday, the eighth day of October, 1918, at the hour of twelve o'clock noon, for an order to advance the above entitled cause under Rule 32 of this Court on the ground that the only question in issue is the question of the jurisdiction of the Court below.

Annexed hereto is an affidavit which will be presented to the Court on the making of said motion.

Respectfully yours,
JAMES D. CARPENTER, JR.,
Attorney of Plaintiff-in-Error.

Affidavit.

STATE OF NEW JERSEY, County of Hudson. } ss.:

JAMES D. CARPENTER, JR., of full age, being duly sworn according to law, upon his oath says: I am a member of the Bar of the Supreme Court of the United States and am Attorney for the Plaintiff-in-Error.

Plaintiff-in-Error is the widow of Robert Coon, who died August 4th, 1915, in the State of New Jersey as the result of an accident arising out of and in the course of his employment with defendant-in-error. Decedent was engineer of the Steam Tug "Elsie K." on a journey from Brooklyn, N. Y., to Elizabeth, N. J., when she foundered and was sunk in a storm in waters within the territorial limits of New Jersey. The Steam Tug "Elsie K." was registered at the Port of Newark, New Jersey. Defendant-in-error was a resident of Elizabeth, N. J.

Plaintiff-in-error filed a petition for compensation under the New Jersey Workmen's Compensation Act, the trial court finding all jurisdictional facts in favor of the petitioner and awarding compensation of three hundred weeks at ten dollars per week for the petitioner and her infant children. Defendant-in-error appealed to the New Jersey Supreme Court from the judgment of the trial court. Some months after the decision in the trial court this Court decided the case of *Southern Pacific Co. vs. Jensen*, 244 U. S., page 205. The New Jersey Supreme Court followed the Jensen case and reversed the judgment of the Union Common Pleas on the sole ground of lack of jurisdiction. Before the opinion of the New Jersey Supreme Court was filed and before the

judgment of reversal was entered in the New Jersey Supreme Court Congress passed the Act of October 6th, 1917 ( ) amending Sections 24 and 256 of the Judicial Code, and "s ving to suitors in all cases the right of a common law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any State".

Plaintiff-in-error appealed from the judgment of the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals, claiming (1) that above Act of Congress saved to Mrs. Coon her rights and remedies under the Compensation Law of New Jersey, including the judgment in this case, by acting retrospectively, and that for that reason the judgment of the New Jersey Supreme Court should be reversed; and claiming also that the Workmen's Compensation Act of the State of New Jersey, unlike the Workmen's Compensation Act of the State of New York passed upon in the Jensen case, did not operate so as to impose any burden whatsoever upon the admiralty jurisdiction. In other words, Mrs. Coon claimed that the decision in the Jensen case did not control actions brought under the Workmen's Compensation Act of the State of New Jersey, although the employe at the time of the happening of the accident might have been injured upon the navigable waters of the United States, but within the territorial limits of New Jersey.

The New Jersey Court of Errors and Appeals affirmed the judgment of the New Jersey Supreme Court. Both the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals deny the jurisdiction of the New Jersey State Courts in this case.

Deponent therefore prays that in view of the fact that the only question in issue is the question of jurisdiction of the New Jersey Courts that this cause may be advanced for early argument under the provisions of Rule 32 of this Court.

JAMES D. CARPENTER, JR.

Subscribed and sworn to before me this 13th day of September, 1918.

Henry A. Oetjen,
Notary Public of New Jersey.
(Seal.)

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 398.

REBECCA COON, *Plaintiff in Error,* *vs.* JAMES KENNEDY, *Defendant in Error.*	*On Error to the Court of Errors and Appeals of the State of New Jersey.*

Brief for Plaintiff in Error.

The writ of error brings up a final judgment of the Court of Errors and Appeals of New Jersey. The case is very much like *Southern Pacific Company* v. *Jensen,* 244 U. S., 205; 61 L. Ed., 1086.

The undisputed facts are that Robert Coon was engineer on the steam tug "Elsie K." owned by defendant in error Kennedy. Kennedy resided in Elizabeth, New Jersey, and registered the "Elsie K." at Newark, New Jersey, pursuant to R. S. Section 4141. Coon was employed a large part of his time in New Jersey and his employment was under the laws of the State of New Jersey. (Record, p. 8, l. 14.) On August 4, 1915, the tug "Elsie K." foundered in a storm while in waters of New Jersey and Coon died in New Jersey. (Record, p. 8.)

Plaintiff in error, the widow, petitioned the Union County Court of Common Pleas for compensation under the Workmen's Compensation Act of New Jersey (N. J. P. L. 1911, Chap. 95). The Common Pleas awarded compensation of three hundred weeks at $10.00 per week to Mrs. Coon and her infant children on June 17, 1916 (record, pp. 7, 8, 9). On certiorari on October 20, 1917, the New Jersey Supreme Court reversed the judgment of the Union Common Pleas on the ground of want of jurisdiction on the authority of *Southern Pacific Company* v. *Jensen, supra,* which was decided May 21, 1917, approximately five months before the decision of the New Jersey Supreme Court in this case. Between the date the Jensen case was decided and the date the New Jersey Supreme Court reversed the judgment in this case, Congress passed the act of October 6, 1917 (Public No. 82, 65th Congress) amending sections 24 and 256 of the Judicial Code relating to the jurisdiction of the District Courts, "so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state." Plaintiff in error appealed to the New Jersey Court of Errors and Appeals from the judgment of reversal of the New Jersey Supreme Court for the reasons that:

(1) The amendment of October 6, 1917, of sections 24 and 256 of the Judicial Code acted retrospectively and saved to Mrs. Coon her rights and remedies in and to the judgment of the Union County Court of Common Pleas which

stood in full force and effect and unreversed on October 6, 1917.

(2) On the ground that Union County Court of Common Pleas did have jurisdiction notwithstanding the decision in the Jensen case for the reason that the Workmen's Compensation Act of the State of New Jersey, on which the judgment below was founded, was materially different from the Workmen's Compensation Act of the State of New York, and did not come within the condemnation of the Jensen case.

The New Jersey Court of Errors and Appeals on March 4, 1918, affirmed the judgment of the New Jersey Supreme Court holding that the Federal jurisdiction over this case was exclusive, and holding that the amendment of October 6, 1917, of the sections of the Judicial Code above mentioned was prospective and not retrospective (record, p. 17).

Chancellor Walker allowed the writ of error, and the reasons for reversal assigned and relied upon are as follows:

Errors Assigned and Relied Upon.

(1) The Court below erred in affirming the judgment of the New Jersey Supreme Court, whereby the jurisdiction of the Union County Court of Common Pleas under the Workmen's Compensation Act of New Jersey (P. L. 1911, Chap. 95) and the amendments thereof and supplements thereto, was denied, notwithstanding the fact that at the time of the accident deceased

was employed by defendant in error in the State of New Jersey, on a domestic vessel registered in Newark, New Jersey, and met his death through an accident arising out of and in the course of his employment with defendant in error in the State of New Jersey, and notwithstanding the fact that the Workmen's Compensation Act of New Jersey was not in conflict with either Article III., Section II. of the Federal Constitution or Article I., Section VIII. of the Federal Constitution, or with sections 24 and 256 of the Judicial Code (record p. 20, reason 1).

(2) The act of Congress approved October 6, 1917 (Public No. 82, 65th Congress) amending sections 24 and 256 of the Judicial Code expressly saved to the plaintiff in error her rights and remedies under the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, Chap. 95), and the New Jersey Court of Errors and Appeals erred in holding that said act of Congress operated prospectively and not retrospectively.

(3) The Court of Errors and Appeals erred in holding that the Workmen's Compensation Act of New Jersey was in violation of and in conflict with the Admiralty and Maritime Jurisdiction of the United States or of the District Courts of the United States.

(4) The Workmen's Compensation Act of New Jersey was passed by the Legislature of New Jersey under its police powers and created in favor of plaintiff in error a common law remedy or a remedy in the nature of a common

law remedy, which was expressly saved by Congress in sections 24 and 256 of the Judicial Code, and such remedy did not conflict with the admiralty and maritime jurisdiction of the United States or the United States District Courts, and the denial to plaintiff in error of such rights and remedies under such statute was error.

POINT I.

Deceased's employment was in New Jersey, under the laws of New Jersey, on a vessel registered in New Jersey and the accident was in New Jersey, therefore the widow is entitled to the benefits of the Workmen's Compensation Act of New Jersey.

The tug "Elsie K." on which deceased worked at the time of the accident, was registered in the Port of Newark, New Jersey. Defendant in error resided in New Jersey, and had his principal place of business in New Jersey. (Admission in Answer, record p. 4, par. 3.) (Court's findings, p. 8 of record.)

The registry was under an act of Congress of December 31, 1792, Ch. I, I Stat. L. 288, R. S. U. S., Sec. 4141, which provides:

> "Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting managing owner of such vessel, usually resides."

New Jersey was therefore the domicile of the "Elsie K."

Crapo v. *Kelly,* 16 Wall. 610, 21 L. Ed. 430.

Hays v. *Pacific Mail S. S. Co.,* 17 How. 596.

Morgan v. *Parham,* 16 Wall. 471.

Blanchard v. *The Martha Washington,* 1 Clif. 466.

"The jurisdiction of the local sovereign over a vessel and over those belonging to her, in the home port and abroad on the sea, is, according to the law of nations, the same."

Wilson v. *McNamee,* 102 U. S. 572, 26 L. Ed. 234.

Old Dominion S. S. Co. v. *Gilmore,* 207 U. S. 398, 52 L. Ed. 264.

Ross v. *McIntyre,* 140 U. S. 453.

Therefore, when Coon engaged himself on the tug "Elsie K." he placed himself, as a matter of law, under the laws of New Jersey. The Trial Court, moreover, found as a fact from the evidence that his employment was under the laws of New Jersey.

The decision of the New Jersey Supreme Court, affirmed by the New Jersey Court of Errors and Appeals, followed the decision in *Southern Pacific Company* v. *Jensen, supra.* In the Jensen case the accident happened in New York City on the steamship "El Oriente," which was owned by the Southern Pacific Company, a corporation of the State of Kentucky, in which state it had its principal office. The "El

Oriente" was a steamship plying between New York and Galveston. The business of the Southern Pacific Company consisted solely in carrying passengers and merchandise between New York and other states. She was not registered in the Port of New York, so far as the decision discloses, and her owner was not subject to the New York Workmen's Compensation Act, except insofar as the act operated upon the steamship "El Oriente" while she was temporarily within the territorial jurisdiction of New York.

These differences in the facts of the two cases we submit are vital differences. Kennedy and his vessel were both domiciled in New Jersey. Coon worked in New Jersey for Kennedy fully one-half of the time (record, p. 8). He was paid his wages in New Jersey by checks drawn on a New Jersey bank (record, p. 8).

Kennedy even carried insurance protecting himself against awards to employees of the tug, under the New Jersey Compensation Act (record, p. 23).

Under these facts Mrs. Coon should receive the compensation provided by the New Jersey statute.

Rogge v. *American Radiator Co.*, 86 N. J. L. 436; affirmed 87 N. J. L. 314; Sup. Ct. Rep., Vol. 38, p. 63; decided by the Supreme Court of the United States, November 19, 1917.

Foley v. *Howe Rubber Co.*, 89 N. J. L. 474; affirmed 102 Atl. Rep. 1053.

Sexton v. *Newark Dist. Tel. Co.*, 84 N. J. L. 85; affirmed 86 N. J. L. 701.

POINT II.

The Workmen's Compensation Act of New Jersey was not in violation of or in conflict with the admiralty and maritime jurisdiction of the United States or the United States District Courts.

The Workmen's Compensation Act of New Jersey at the time of the happening of this accident had none of the features of the New York act, which were held in the Jensen case to be in contravention of the general maritime law in its international and interstate relations.

As pointed out in the opinion of Justice McReynolds, no ship could load or discharge her cargo in New York without incurring a penalty unless her owners complied with the act. The New York act provided that if an employer failed to comply with the compulsory insurance features of the act he should be liable to a penalty.

This Court said of the New York act:

> "The fundamental purpose of the Compensation Law, as declared by the Court of Appeals, is 'the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments,' among them being 'longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, &c." (Jensen opinion, p. 213.)

The Workmen's Compensation Act of New Jersey did not have one of these features. This

act is entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder."

The act provides two methods of affording compensation. The first section gives compensation by an action at law. Under the first section an employee cannot sue unless either employer or employee gives notice that Section I. of the act is to apply to the given employment. Under that section of the act it is necessary for the employee to prove negligence before he can recover.

Section II. of the act applies when employer and employee shall by agreement, either express or implied, accept the provisions of Section II. of the act, wherein compensation is provided for personal injuries or death by accident arising out of and in the course of the employment.

Section IX. of the act provides that:

> "Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of Section II. of this act, and unless there be as a part of such contract an express statement in writing, prior to an accident, either in the contract itself or by written notice from either party to the other, that the provisions of Section II. of this act are not intended to apply, then it shall be presumed that the parties have accepted the provi-

sions of Section II. of this act and have agreed to be bound thereby."

The employment in this case, therefore, according to the facts found by the Trial Court and by operation of Section II. of this statute, was an employment in New Jersey under Section II. of the Compensation Act.

There is not a word in the Workmen's Compensation Act of New Jersey which imposes any different obligation upon employments on vessels than it imposes upon any other kind of employment in the State of New Jersey. There is not a word in the statute about compulsory insurance. There is not a word in the New Jersey act about the creation of a state fund to insure the payment of compensation. The statute applies indiscriminately to all employments in New Jersey.

The employment of Coon by Kennedy was therefore as much within the statute because of the statutory presumption as though in the contract of employment itself Kennedy had by express words promised to compensate Coon in case of accident in the manner provided by the Workmen's Compensation Act of New Jersey.

If in a written contract of employment Kennedy had expressly agreed to pay Coon in case he was injured by an accident arising out of and in the course of his employment on the tug the same compensation that the statute provides, would the contract be null and void because of the admiralty jurisdiction of the Federal Courts?

Is the statutory presumption that the employment of Coon by Kennedy was under the State Compensation Act null and void simply because it was not reduced to writing by employer and employee?

There is no act of Congress which prohibits the owner of a vessel from agreeing to pay compensation to an injured seaman.

The owner may not limit his liability for seamen. 23 Stat. L. 57.

The law imposes liability in certain cases. If the parties in their contract of employment may lawfully provide for compensation in a case where negligence is not present, why cannot the state in which the master lives, and in which the servant performs his work, protect itself against the pauperism of the dependents of the seaman by providing that in all employments compensation shall be paid by the employer where injury happens in the course of the employment?

There being no law which makes this contract between vessel owner and seaman unlawful, even though it is a provision of the contract imposed by the state, we submit that the judgment below should be reversed.

POINT III.

The Workmen's Compensation Act of New Jersey was passed under state police powers and created a remedy which did not conflict with the admiralty and maritime jurisdiction of the United States Courts.

In the only reported case where the question of possible conflict between the New Jersey Workmen's Compensation Act and the Admiralty Courts came in question (*Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 Fed Rep. 763 (decided January 13, 1915), the District Court of the United States for the District of New Jersey held that:

> "Neither the contract of hiring, nor the obligation annexed to it by the New Jersey statute, is maritime (*Insurance Co.* v. *Dunham*, 78 U. S. 11, Wall 1; 20 L. Ed. 90), and neither is subject to the exclusive control of the maritime law."

Berton, who was injured on a floating dry dock, filed a petition for compensation under the State Act. The owner of the dry dock filed a petition to limit its liability under the Limitation of Liability Acts of Congress, sections 4283, 4284 and 4285 R. S. U. S. (Comp. Stat. 1913, sections 8021-8023), and prayed that the action in the Common Pleas Court be restrained. Judge Rellstab, dismissing the petition for limitation of liability, said:

> "It is only when the substance of the whole contract is maritime that a court of admiralty takes jurisdiction. * * * It is within the power of Congress at any time

to give the courts of admiralty exclusive jurisdiction over all matters of controversy arising upon navigable waters; but, so long as concurrent common-law remedies are saved it is essential, in order to avoid undue friction between these two ancient and formerly conflicting jurisdictions, and to obtain a speedy, economical and harmonious administration of justice, that in matters of concurrent jurisdiction that court which first takes cognizance should proceed without interference to a finality. Such a course rests not alone on comity, but on necessity. (Cases cited.) This suit must therefore be remanded, unless the appeal to the limited liability statutes requires that Federal jurisdiction should be retained as the only Court competent to afford such relief; for it is clear, however this statutory obligation imposed upon employers may be classified—contractual, delictual or sociological—that it is not purely maritime in its nature. If not maritime, on that ground the suit is not removable; and, if maritime, it not being exclusively so as it is enforcible by a suit in *personam* cognizable in a Court exercising common-law remedy, it is not removable, because the suitor had a choice of concurrent remedies, and his choice controlled."

The New Jersey Compensation Act imposes no restrictions on commerce or upon the admiralty and maritime jurisdiction of the United States Courts. It was passed without reference to the admiralty. It was passed in the exercise of the state's police powers. It imposes its beneficient provisions into every contract of employment in the state from the date it became effective. It was passed out of the same hu-

mane considerations which led to the passing of such statutes as the Tenement House Act (P. L. 1904, p. 96), which provides for the protection of persons who are obliged to live in crowded tenements in cities, to the passing of the Labor Laws (3 Comp. Stat. 3039) which provides that no child of tender years shall be permitted to stunt its growth in factories; the School Laws (4 Comp. Stat. 4775) which provide that children shall be compelled to attend school until they have received at least the rudiments of an education, and the Widows' Pension Laws (P. L. 1913, p. 578), which protect unfortunate widows and orphans in their extremities.

Since "in the absence of congressional legislation the settled general rule is that, without violating the commerce clause, the states may legislate concerning relative rights and duties of employers and employees while within their borders, although engaged in interstate commerce" (*Valley Steamship Company* v. *Wattawa*, 244 U. S., p. 202; 61 L. Ed. 1084), the judgment below should be reversed and the judgment awarding compensation should be affirmed.

POINT IV.

The remedy afforded by the New Jersey Compensation Law was within the meaning of Sections 24 and 256 of the Judicial Code.

We are aware that this Court said in the Jensen opinion that:

> "The remedy which the compensation statute (of New York) attempts to give is

> of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

The Workmen's Compensation Act of New Jersey (Sec. 18, P. L. 1911, p. 141), provides that in case of dispute over a claim for compensation between employer and employee either party may submit the claim to the Judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case, which judge is authorized to hear and determine such disputes in a summary manner.

Section 20 of the act (P. L. 1911, p. 142), provides that on the filing of a petition with the Clerk of the Court of Common Pleas the Judge shall by order fix a time and place for hearing and a copy of the petition and order shall be served upon the adverse party, who must file his answer to the petition within seven days after service. At the time fixed for hearing, or any adjournment thereof, the Judge shall hear the witnesses and in a summary manner decide the merits of the controversy.

> "This determination shall be filed in writing with the clerk of the Common Pleas Court and the judgment shall be entered thereon in the same manner as in causes tried in the Court of Common Pleas, etc."

The Court of Common Pleas of New Jersey has common law jurisdiction throughout the county.

The Workmen's Compensation Act deprives workmen in New Jersey of their common law right to sue the master in the state courts for negligent acts. It would, of course, not deprive seamen of their rights in the admiralty courts.

The objects of a common law action founded upon negligence, and the statutory petition for compensation are identical, namely, compensation to the injured for injuries received. In a common law action suit is begun by a summons, accompanied by the filing of a complaint—the modern procedure for filing of a narr at common law. A compensation suit is begun by the filing of a petition and the service of an order requiring the defendant to answer. Aside from the inconsequential changes in forms the only differences between the ancient common law remedy and the modern remedy under the compensation act, are that in the former negligence must be proved and a jury assesses the damages, while in the latter negligence need not be proved and the damages are fixed by statute. The compensation once awarded is collected by a common law writ of execution.

It would seem therefore that the remedy provided by the New Jersey statute under consideration may well be considered to be a "common law remedy" within the meaning of sections 24 and 256 of the Judicial Code.

Before the amendment of October 6, 1917, these sections of the Judicial Code permitted personal actions between seamen and shipowners to be brought in the state courts in matters

ex contractu as well as *ex delicto.* The compensation proceeding is a proceeding in *personam* arising out of the contract of employment, and we submit should not be construed like the New York Act, wherein the remedy is entirely different.

POINT V.

The amendment of Sections 24 and 256 of the Judicial Code, October 6, 1917, being remedial in its nature, saved this cause of action.

Final judgment was entered in this case in the Common Pleas Court June 17, 1916. It was reversed by the New Jersey Supreme Court October 20, 1917. Two weeks before it was reversed Congress passed the following statute:

"Public—No. 82—65th Congress.)
(S. 2916)

An Act to amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any state.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

'Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and rem-

edies under the Workmen's Compensation Law of any state; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.'

. Sec. 2. That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

'Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state.'

Approved, October 6, 1917."

The purpose of this act is obvious. It was *to save* to claimants their rights and remedies under the compensation law of any state and to correct the defect in the Judicial Code as originally passed. This defect was solely due to the progressive development of the law, for, at the time the Judicial Code was originally passed (it was approved March 3, 1911), workmen's compensation legislation was just being introduced in this country and probably it did not occur to any member of Congress at that time that claims under such statutes might be said to conflict with the admiralty jurisdiction of the District Courts. Since the intention of Congress in the act approved in 1911 was clear to save "to suitors in all cases the right to a common-law remedy where the common-law is competent to give it," it is manifest that rights in the state

courts were intended to be preserved. The unusually quick introduction and passage of the amendment to the Judicial Code indicates that the omission of a clause saving compensation remedies was an oversight or defect occasioned alone by the progress of events.

It is true that ordinarily statutes will be construed prospectively. Nevertheless, where the intention of the Legislature is clear to remedy a defect in existing law so as to save rights that would otherwise be lost solely because of the progressive development of the law, there would seem to be no reason to follow the general rule.

There is no constitutional inhibition against retrospective laws. Though generally distrusted, they are often beneficial, and sometimes necessary. Where they violate no provision of the Constitution of the United States, there exists no power in the Federal courts to declare them void.

> *Blount* v. *Windley*, 95 U. S. 173, 180; 24 L. Ed. 424.

In *Baltimore & Ohio R. R. Co.* v. *Nesbit*, 10 How., 395, 401; 13 L. Ed. 469, it was said:

> "That there exists a general power in the state governments to enact retrospective or retroactive laws is a point too well settled to admit of question at this day. The only limit upon this power in the states by the Federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*,

or such as impair the obligation of contracts."

Speaking of the above decision, the Court says:

> "This decision, it is true, was before the Fourteenth Amendment and the restrictions placed by the amendment upon state action apply to retrospective as well as prospective legislation. But it contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution."
>
> *League* v. *Texas,* 184 U. S., 156; 46 L. Ed. 478.

A legislative body may by statute decree the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the parties concerned is violated.

> *Stockdale* v. *Insurance Companies,* 20 Wall., 323; 22 L. Ed., 348.
>
> *Pennsylvania* v. *Wheeling & Bridge Co.,* 18 How., 421; 15 L. Ed., 435.
>
> *The Clinton Bridge,* 10 Wall, 454; 19 L. Ed., 969.

This Court said in *McFaddin* v. *Evans-Snider-Buel Co.,* 185 U. S., at page 509, 46 L. Ed., 1017, that a statute which in terms declared "all mortgages of personal property in the Indian Terri-

tory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed, are hereby validated," did not apply only to mortgages made after the passage of the act, and that it had a retroactive effect.

Since Congress may cure irregularities in statutes, and even ratify the illegal collection of duties or imports, provided such confirmation does not interfere with intervening rights (*U. S.* v. *Heinszen,* 206 U. S., at page 387, 51 L. Ed., p. 1104), it would seem that there is no question of its power to cure this defect in the Judicial Code, and it was nothing but a defect.

> "Statutes enacted for the suppression of fraud, the correction of errors, the supplying or curing of defects, the protection of life and property, the remedy of public evils, the redress of existing grievances, introducing some new regulation or proceeding conducive to the public good, or the granting of remedies for the recovery or protection of rights, are known as remedial statutes. In construing such statutes, regard should be had to the former law, the defects or evils to be cured or abolished, and the remedy provided; and they should be interpreted liberally so as to promote the object of the Legislature by suppressing the mischiefs and advancing the remedy."
>
> 36 Cyc., pp. 1173-1174, and cases cited.

It is urged that under the circumstances it is but just to determine that this amendment operated retrospectively and not merely prospectively. The words in the title "so as to save to claimants their rights and remedies under the

Workmen's Compensation Law of any state" indicate that existing rights and remedies were intended to be protected.

Great Northern R. R. Co. v. *U. S.*, 208 U. S. at p. 465; 52 L. Ed., p. 576.

The words "to save to claimants" indicate the purpose to protect claimants at that time. Mrs. Coon was in this class. Her husband had met his death in an accident arising out of and in the course of employment. The Union County Court of Common Pleas had given her a final judgment, which on the date the act of Congress was approved was in full force and virtue and unreversed.

Does not justice require that the statute under consideration be construed so as to save this claimant's right to compensation? Such a decision would save a right given by state law and enforce an obligation which had been voluntarily assumed by defendant in error.

It is respectfully urged that the judgment of the New Jersey Court of Errors and Appeals should be reversed, and the judgment of the Union County Court of Common Pleas affirmed.

JAMES D. CARPENTER, JR.,
Of Counsel with Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 398.

REBECCA COON, *Plaintiff in Error,* *vs.* JAMES KENNEDY, *Defendant in Error.*	*On Error to the Court of Errors and Appeals of the State of New Jersey.*

Brief of Defendant in Error.

The undisputed facts in the case are correctly stated in the brief of the plaintiff in error, with one exception. On page 1 of his brief, in describing the sinking of the Elsie K, he says: "On August 4, 1915, the tug 'Elsie K' foundered in a storm while in waters of New Jersey and Coon died in New Jersey."

This statement is entirely too brief, for the Court is not made aware of all the facts necessary for the determination of this issue. The Elsie K sank under the following circumstances: "On August 4, 1915, while the tugboat was on its way from New York toward the City of Elizabeth (New Jersey), a violent storm swamped it and it sunk in water to a depth of thirty-three or thirty-five feet" (case, p. 5, ll. 11 to 14). The place of the sinking was between Staten Island, New York, and Constable Hook, New Jersey.

The Trial Court, in filing his conclusions, made the following statement with regard to the point of sinking:

> "The boundary line between New York and New Jersey, lies about in the middle of the Kill von Kull, where that stream runs into New York Bay, but at the mouth of the Kill turns from a northeasterly direction and runs due east for about one mile and a half toward the Long Island shore. On the north, or New Jersey side of this line, the New Jersey shore recedes in a northeasterly direction, while the Staten Island shore recedes in a southeasterly direction, leaving an immense distance between the shores of the two states. The foundering of the respondent's tug took place at this point" (case, bottom of p. 6, top of p. 7).

In other words, the accident did not occur actually in the deep waters of the Kill, but, as was stated by John W. Schlig, a witness produced by the defendant in error, the accident occurred at about the entrance of the Kill von Kull (case, p. 22).

POINT I.

The widow is not entitled to the benefits of the Workmen's Compensation Act of New Jersey.

We have examined the cases relied upon by the plaintiff in error as authority for his statement in Point I., which authorities appear on page 6 of his brief. These authorities, partica-

larly *Old Dominion S. S. Co.* v. *Gilmore,* 207 U. S. 398, hold as follows (italics ours):

> "Apart from the subordination of the (State of New Jersey) to the Constitution of the United States, there is no doubt that it would have had power to make its statute applicable to this case."

We shall, later on, take up the question of the conflict of jurisdiction of the subject matter between the admiralty courts and the Common Pleas Court of the State of New Jersey. Subject to the rule above quoted from the cases mentioned in the brief of the plaintiff in error, we hold that the widow would not receive any benefits from the compensation act of New Jersey. There is no doubt but that for certain purposes Coon's employment was under the laws of the State of New Jersey, but when his death occurred in an accident on the high seas or on a navigable stream of the United States, while he was engaged as an engineer on the tugboat, his duties at that time and his employment were subject to the rules of the maritime and admiralty law.

My opponent also argues that this Court should consider Kennedy carried compensation insurance in New Jersey. Of course, that does not change the rule of law applicable to the facts under review. A man usually takes insurance coverage where his broker suggests. It is a fact, however, that Mr. Kennedy merely suggested that he understood he was covered in New Jersey (case, p. 23).

The cases cited by the plaintiff in error, on page 7, have no bearing upon the case under review, because in those cases the work of the injured or deceased had no relation to Federal Employers' Liability Act or admiralty or maritime law. In other words, the injured was not in the employment of the instrumentality which may have been engaged in interstate or maritime work, but merely used it to perform his work, because his work took him to distant parts.

POINT II.

The Workmen's Compensation Act of New Jersey was in violation of and in conflict with the Admiralty and Maritime Jurisdiction of the United States and the United States District Courts.

This case is controlled by *Jensen* v. *Southern Pacific R. R. Co.*, 244 U. S. Rep., p. 205. No distinction can be made between the compensation acts of New York and New Jersey. The wording of the two statutes differ, but the purpose and legal effect are identical.

The New York act provides for the payment by the employer of a penalty in the event of his failure to follow the requirements of the act as to securing the compensation payments. In the opinion of this Court, Justice McReynolds points out the purpose of the New York act, which in the last resort seems to provide for prescribed compensation payments for certain periods of time in certain hazardous employments. In another part of the opinion there is a reference to the unloading of ships at

a New York dock, and in this part of the opinion the point which stands out is that the payments are made without regard to FAULT or negligence of the employer. The only difference between the acts is that the New York act specifies the employments covered, whereas the New Jersey act, chapter 95, Laws 1911, covers all employments. (*American Radiator Co.* v. *Rogge*, 86 L., p. 436; aff. U. S. Nov. 19, 1917.) *The New Jersey act is the broader in scope.* (*De Filippio* v. *Falkanberg*, 170 App. Div., p. 153.)

The New Jersey act failed to provide a penalty against one who has neglected to secure the compensation payments to his employees, but the employee's potential right to compensation exists in every contract or hiring in New Jersey made and to be performed there or in a foreign state, or where the contract or hiring is made in a foreign state to be performed in New Jersey. (*Sexton* v. *Newark Dist. Tel. Co.*, 84 N. J. L. 85, aff. 86 N. J. L. 701; *Foley* v. *Howe Rubber Co.*, 89 N. J. L. 474, aff. 102 Atl. Rep. 1053; *Rogge* v. *Am. Radiator Co.*, 86 N. J. L. 436, aff. 87 N. J. L. 314, aff. U. S. Sup. Ct., Nov. 19, 1917.) Applying the New Jersey act, and disregarding Federal jurisdiction for the time, can it be gainsaid that when a foreign ship is discharging a cargo at a New Jersey dock that the terms of the Workmen's Compensation Act of New Jersey would not apply in the event of personal injury by accident? All of the cases above cited indicate to the contrary. The Jensen opinion reads further:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. THE NECESSARY CONSEQUENCE WOULD BE DESTRUCTION OF THE VERY UNIFORMITY IN RESPECT TO MARITIME MATTERS WHICH THE CONSTITUTION WAS DESIGNED TO ESTABLISH, AND FREEDOM OF NAVIGATION BETWEEN THE STATES AND WITH FOREIGN COUNTRIES WOULD BE SERIOUSLY IMPAIRED AND IMPEDED."

New Jersey's act would cause same result.

The purpose of compensation acts is the payment of compensation to employees, regardless of whether employee was negligent or careless, in the event of an accident. To hold that the New Jersey act does not contravene the provisions of the act of Congress with regard to admiralty and maritime matters, merely because compulsory insurance is not provided therein, would interfere with the proper harmony and uniformity of that law in its international and interstate relations.

The Jensen opinion further states:

"And plainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress and works material prejudice to the characteristic features of the general maritime law."

Another quotation from the same opinion reads:

"It certainly could not have been the intention to place the rules and limits of mari-

> time law under the disposal and regulation of the several states, as that would have tainted the uniformity and consistency at which the Constitution aimed, on effecting the intercourse of the states with each other or with foreign states."

The Judicial Code of the United States has given the United States District Courts and admiralty the exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction, saving to all suitors the right to a common law action wherever the common law is competent to give it.

This Court has already declared that the Federal Employers' Liability Act is paramount to the New Jersey Workmen's Compensation Act. (*Winfield* v. *Erie R. R. Co.*, 244 U. S., p. 170.). *It is our contention that the admiralty jurisdiction of the United States District Courts under the civil code is equally as exclusive and paramount to the state legislation as the Federal Employers' Liability Act.* A reference to the equal exclusiveness of the Federal Employers' Liability Act and the Federal jurisdiction in admiralty matters appears in the Jensen decision:

> "A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it, is now firmly established" (244 U. S. at p. 1099).

Therefore, if the New Jersey Compensation Act is held to be invalid when in conflict with

one Federal legislation, it is equally invalid when in conflict with the other.

The work of an engineer upon a tug, in which work the deceased was engaged at the time of his death (case, p. 2), is maritime in its nature. His employment was a maritime contract. His death occurred upon a navigable stream of the United States in an accident there, and therefore the rights and liabilities of the parties in connection therewith was clearly within the admiralty jurisdiction. (*Atlantic Transport Co.* v. *Imbrouck*, 234 U. S., p. 52.)

The waters between New Jersey and Staten Island and the entrance to the Kill von Kull come within admiralty jurisdiction (*De Voe Mfg. Co.*, 108 U. S., p. 764.)

The argument of the plaintiff in error that the New Jersey compensation act merely imposes the same obligations upon employments on vessels that it does upon other kinds of employment in New Jersey, *does not alter the fact that the legislation does effect the status of an engineer upon a vessel going from New York to Elizabeth, New Jersey, and traveling upon a navigable water of the United States.* It would add to his original contract of hiring the right to recover compensation from his employer in the event of injury in New Jersey, or at the dock, *without first establishing negligence of the employer.* The compensation act is not so much concerned with the state fund or insurance with insurance companies as it is with compensation to employees of a certain fixed weekly amount

of money for certain fixed periods of time in the event of injury in the State of New Jersey, and this argument applies with equal force to the New York act.

POINT III.

The Workmen's Compensation Act of New Jersey conflicts with the Admiralty and Maritime Jurisdiction of the United States Courts even though passed under state police powers.

This point is practically covered by the argument in Point II.

The reference by the plaintiff in error to a decision in the United States District Court for the District of New Jersey is of no vital consequence since it was rendered before the opinions by this Court in the Jensen and two Winfield cases. The excuse that the act was passed under the police power of the state will not protect it if it contravenes exclusive Federal jurisdiction. There is also a reference to the case of *Valley Steamship Co.* v. *Wattawa,* 244 U. S., p. 202, which upon examination discloses no argument against our position. This Court did not consider the conflict of jurisdiction between the state legislation and the Federal jurisdiction in that case because it was not properly raised; and so, as far as this cited case is concerned, there was an absence of congressional legislation. For this reason we think that the Wattawa case is of no value in the determination of the one under review.

POINT IV.

The remedy afforded by the New Jersey Compensation Act is not such a common law remedy which is safe to suitors under the judicial code of the United States.

My opponent cites in his brief (pp. 14 and 15) from the opinion in the Jensen case, then attempts to except the New Jersey act from this general rule. Fundamentally, all compensation acts in the United States are alike, since, to every contract of hiring, these states have added the terms of the Workmen's Compensation Act, perhaps somewhat different in procedure, but that is all. The *negligence* of the employer is entirely removed from consideration under all these statutes.

The second paragraph of my opponent's brief answers his own argument in this, that he says the only difference between a compensation act and an act at law is that in the latter negligence must be proven against the employer. We think this is a vital distinction. The manner in which the liability for compensation payments arises has hereinbefore been discussed. There is no difference between the substance of the New Jersey act and the act of any other state. He also makes the following statement on page 15 of his brief:

> "The Court of Common Pleas of New Jersey has common law jurisdiction throughout the county."

It is well to note, however, that when the Judge of the Common Pleas Court sits in an

action under the compensation act it is not with his common law powers, but with such powers as is given him by the terms of the Workmen's Compensation Act, and therefore entirely statutory. The amendment of sections 24 and 256 of the Judicial code *indicate that compensation statutes were not considered common law remedies.*

POINT V.

The amendment of Sections 24 and 256 of the Judicial Code, October 6, 1917, is not retroactive.

The drowning and death of Coon occurred on August 4, 1915, and the rights of the parties were fixed as of that time. The congressional amendment followed in time, the decision in the Jensen case, and saved to claimants under a state compensation act all rights, even though the admiralty had concurrent jurisdiction. There is nothing about the amendment to indicate that Congress intended that it should act retroactively. The prompt introduction of the amendment merely indicated that it was considered advisable to save to suitors their rights under compensation actions in addition to the common law remedies.

The decisions quoted by the plaintiff in error reiterate that, though retroactive statutes may be passed, they must not be violative of contractual rights or impair the obligation of contracts or interfere with vested rights. The other cases quoted by the appellant merely refer to confirmative or curative statutes.

We beg leave to refer also to the opinion of Justice Parker in the New Jersey Court of Errors and Appeals, which covers most fully the argument made by the plaintiff in error in Point V. His opinion is on pages 17 and 18 of the case. The rule that statutes will be construed prospectively unless the intention of the legislation is expressed to the contrary, has been laid down in this Court. (*Auffmordt* v. *Rasin*, 102 U. S., p. 620; *United States* v. *Heth*, 3 Cranch, p. 413.)

The legal relationship between the parties up to the time of Coon's death was that, in the event of Coon's death by accident, the employer would not be liable in damages unless predicated upon negligence. The defendant would also have the right to set up contributory negligence. The damages to be paid in the event of liability of the employer must have necessarily been based upon actual proof of loss to the personal representatives in the event of death.

Under the amendment to the Federal code, saving to suitors the right to bring compensation actions, the contributory negligence of the injured or deceased would be no defense, and the employer's liability would exist whether he were negligent or not. To hold that the amendment disturbed the legal relationship of the parties as it existed in 1915, when the death occurred, would be violative of every constitutional right, safeguarding him against losing his property without due process of law, and impairment of the obligations of contract and an interference with vested rights.

Since statutes ordinarily are regarded in a prospective light, the amendment of October 6 should not be held to control the statutes of the parties on August 4, 1915; and, for a stronger reason, the amendment should not control where the result would be to deprive the defendant of a substantial right, namely, that the plaintiff must prove negligence before he makes out a *prima facie* case against the defendant. *Great Northern R. R. Co.* v. *U. S.*, 208 U. S., cited by plaintiff in error, seems to be a boomerang, for this case is entirely favorable to defendant in error, and particularly the argument following the reference to paragraph 13 of the United States Revised Statutes.

There is a reference in this case to that of *U. S.* v. *Reisinger*, 128 U. S., p. 398. These cases tend to confirm the view that the amendment by Congress should be considered in a prospective light. The words "so as to save claimants, &c.," were present in the original act, as we understand it, and were not added by Congress when the amendment to sections 24 and 256 of the Judicial Code were passed. In other words, there is no intention by Congress shown by the language used in the amendment that the same should be applied retroactively.

The judgment of the Court of Errors and Appeals of New Jersey should be affirmed.

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